MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1973 No.

74-209

Gila River Pima-Maricopa Indian Community, in its own right and on behalf of its constituent tribes the Pima Indians and the Maricopa Indians, and on behalf of its members;
Salt River Pima-Maricopa Indian Community, in its own right and on behalf of its constituent tribes the Pima Indians and the Maricopa Indians, and on behalf of its members;
Alfred Jackson and Billman Hayes as representatives of the Pima Indians;
Cyrus Sunn and Dan French as representatives of the Maricopa Indians; and
the Indians residing on the Maricopa-Ak Chin Indian Reservation;

Petitioners,

v.

United States,

Defendant.

PETITION FOR WRIT OF CERTIORARI
TO UNITED STATES COURT OF CLAIMS

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

The petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Claims entered in the above case on April 17, 1974.

OPINIONS BELOW

The Opinion of the United States Court of Claims, as yet unreported, is appended hereto as Appendix A. The earlier relevant opinion of the Indian Claims Commission is reported at 27 Ind. Cl. Comm. 11 (1972) and is appended hereto as Appendix B.

JURISDICTION

The judgment of the Court of Claims appears only in its Opinion entered April 17, 1974. The time in which to file a petition for writ of certiorari was extended to August 30, 1974, by order of this Court entered July 15, 1974. The jurisdiction of this Court is invoked under 25 U.S.C.

70(c); c. 959, §20, 60 Stat. 1054; 28 U.S.C. 1255(1); c. 646, 62 Stat. 928 (1948).

QUESTION PRESENTED FOR REVIEW

Does the Indian Claims Commission Act depart from the rule of United States v. Santa Fe P. R. Co., 314 U.S. 339, 62 S. Ct. 248, 86 L.Ed. 260 (1941) that an extinguishment of Indian title can be found only from a clear and plain indication of a congressional intent to extinguish?

STATUTORY PROVISION INVOLVED

The pertinent portion of the Indian Claims Commission Act is found in 25 U.S.C. §70(a)(4); c. 959, §2, 60 Stat. 1050 (1946), which provides:

> "Jurisdictions; claims considered ... The commission shall herein determine claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: ... (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant ... "

STATEMENT OF THE CASE

Petitioners are Pimas and Maricopas, identifiable groups of American Indians, maintaining tribal organizations recognized by the Secretary of the Interior as having authority to represent such groups and to present claims pursuant to the Indians Claims Commission Act (60 Stat. 1049 (1946), 25 U.S.C. §70 (1958 ed.)). Petitioners seasonably filed their petition in the Indian Claims Commission on August 8, 1951, asserting a claim for the taking by the United States of petitioners' aboriginal lands. On January 20, 1972, the Indian Claims Commission entered its Interlocutory Order, Additional Findings of Fact and Opinions, determining that petitioners' aboriginal title had been extinguished by the United States in 1883. On June 7, 1972, the Commission entered its Order denying Motion for Rehearing.

On July 27, 1972, petitioners timely filed a Notice of Appeal in the United States Court of Claims. The United States cross-appealed. Thereafter, on April 17, 1974,

the Court of Claims issued its Opinion affirming the decision of the Indian Claims Commission in disposing of the Government's cross-appeal. The court applied the standards for determining an extinguishment of Indian title as such standards were enunciated in United States v. Santa Fe R. Co., 314 U.S. 339, 62 S. Ct. 248, 86 L. Ed. 260 (1941). Surprisingly, however, in denying petitioners' appeal, the Court of Claims, rather than merely finding the evidence met the requirements of Santa Fe, instead chose to relax the high standards of Santa Fe. In the Court's own words:

> "...[T]he Commission was faced with a difficult task. Unlike some other cases, there was here no formal cession by the Indians, no express indication by Congress (or its delegate) of a purpose to extinguish at a specified time, and no single act (or contemporaneous series of acts) of the Federal Government which indisputably erased native ownership at one swoop. The Indian appellants say that, in these circumstances, the presumption of the Santa Fe opinion requires the tribunal to hold that there was no general taking at all until some unequivocal action by Congress ... We think, however, that this is a case in which the history

> of the award area is such that the Commission could permissibly stop short of an uncontroverted and unmistakable sign from Congress."

REASONS FOR GRANTING THE WRIT

In United States v. Santa Fe P. R. Co., 314 U.S. 339, 62 S. Ct. 248, 86 L. Ed. 260 (1941), this Court considered the question of when, if at all, the Indian title of the Walapai (Hualpai) Tribe of Arizona was extinguished. In reaching its decision a unanimous court reviewed and reaffirmed a long line of prior Supreme Court decisions on the Indian right of occupancy. Just recently this Court noted,

> "As indicated in Santa Fe, the fundamental propositions which it restated were firmly rooted in earlier cases .... " Oneida Indian Nation v. County of Oneida, New York, 41 U.S. 661, 669; 39 L. Ed.2d 73, 94 S. Ct. 772 (1974).

One fundamental holding of Santa Fe is that a " ... clear and plain indication that Congress ... intended to extinguish" Indian title is the necessary prerequisite to a judicial determination of such extinguishment.

This strict requirement of a "clear and plain indication ... " of a congressional intent to extinguish a tribal occupancy right has been consistently adhered to in cases before both the Indian Claims Commission and the Court of Claims (e.g., see Lipan Apache Tribe v. United States, 180 Ct. Cl. 487, 15 Ind. Cl. Comm. 532 (1967).

In deciding this case, however, the Court of Claims announced a new rule of permissible deviation from Santa Fe:

> "We think, however, that this is a case in which the history of the award area is such that the Commission could permissibly stop short of an uncontroverted and unmistakable sign from Congress." Gila River Pima-Maricopa Indian Community v. United States, Ct. Cl. at 9 (decided April 17, 1974); 27 Ind. Cl. Comm. 11 (1972).

The paraphrasing of the Santa Fe standard of a " ... clear and plain indication of Congress ... " to " ... an uncontroverted and unmistakable sign from Congress ... "not obscure the radical change in a fundamental principle of Indian law.

The Court of Claims points out that the Indian Claims Commission was faced with a difficult task. But a difficult case does not justify the modification of such a long established rule of Indian law.

The Court reasons:

> "...At some point in the ongoing process ... the Government must have concluded, for itself, that the end had been reached .... "

The court concedes that there was

> " ... no express indication by Congress (or its delegate) of a purpose to extinguish at a specified time, and no single act (or contemporaneous series of acts) of the Federal Government which indisputably erased native ownership at one swoop .... "

But if, as Santa Fe holds, " ... an extinguishment cannot be lightly implied ... " the necessary congressional intent must appear from some unequivocal act or series of acts.

The court in Gila River considers the "problem" that

> " ... the supreme power to extinguish Indian title is vested in Congress but the 1883 enlargement was the result of an Executive Order of the President.... "

The court disposes of this problem by finding

congressional authority and ratification of the Executive Order. But this is begging the question. The creation of the 1883 reservation is not of itself an unambiguous act of extinguishment. The issue is whether there was an intent to extinguish, not whether there was an intent to authorize or ratify a reservation.

The concurring opinion points out that

> " ... nothing happened in 1883 that could have constituted a taking of these Indians' heritage, at least not in the traditional eminent domain sense. In a true Fifth Amendment case such looseness in fixing a taking date would be unacceptable ... Here, however, we are dealing with an 'extinguishment' of aboriginal title rather than a true taking....."

If indeed. as Santa Fe reiterates, the " ... Indian right of occupancy is considered as sacred as the fee simple of the whites .... " such looseness is likewise here unacceptable.

Petitioners find nothing in the Indian Claims Commission Act or its history which indicates a departure or a relaxation of the standards of Santa Fe.

CONCLUSION

This Court should grant certiorari and reaffirm the requirements of United States v. Santa Fe P. R. Co., 314 U.S. 339, 62 S. Ct. 248, 86 L.Ed. 260 (1941) on the extinguishment of Indian title.

Respectfully submitted,

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